## Subject Index

## Table of Authorities Cited

## Codes



## Rules



## Senate Reports



## Statutes

## Texts

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1973

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE BISCUITS, INC., a corporation, and STANDARD BRANDS, INC., a corporation,
*Petitioners,*

VS.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The Opinion of the Court of Appeals (R. 112-122)[1] is reported at 472 F.2d 764. The Order and Judgment

[1] "R." references are to the Single Appendix.

of Criminal Contempt of the District Court (R. 90-97) is unreported.

---

## JURISDICTION

The judgment of the Court of Appeals was entered January 18, 1973 (R. 112). The petition for a writ of certiorari was filed on May 22, 1973, and was granted October 9, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1). Federal jurisdiction was initially invoked herein under 29 U.S.C. §185 by the removal of this case from the Superior Court of the State of California to the United States District Court for the Northern District of California.

---

## QUESTIONS PRESENTED

1. Where a conflict exists between state law and the federal removal statute concerning the effective period of a state court temporary restraining order, which law should apply in determining the effective period of such restraining order after removal of the underlying action to federal court?

2. Where a conflict exists between the Federal Rules of Civil Procedure and the federal removal statute concerning the effective period of a state court order issued prior to removal, which law or rule should apply in determining the effective period of a restraining order after removal of the underlying action to federal court?

3. Does the denial by the district court, after hearing, of a motion to dissolve a removed temporary restraining order constitute the issuance of a preliminary injunction within the meaning of the Federal Rules of Civil Procedure for purposes of enforcement by contempt judgment?

---

## STATUTORY PROVISIONS INVOLVED

Title 28, Section 1450, of the United States Code (1970), provides as follows:

> "Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State Court.
>
> "All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.
>
> *"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."* [Emphasis added.]

This case also involves 28 U.S.C. §2071, Rules 65(b) and 81(c) of the Federal Rules of Civil Procedure

and Section 527 of the California Code of Civil Procedure, all of which are set forth in the Appendix hereto.

---

## PROCEEDINGS BELOW

### A. The proceeding in the Superior Court.

On May 15, 1970, Petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., sought and obtained a Temporary Restraining Order and Order to Show Cause in the Superior Court of the State of California for the County of Alameda against picketing and work stoppages induced by Respondent (the "Union") at said Petitioners' Alameda County facilities. Petitioners contended that Respondent's strike and picketing activities breached the no-strike and grievance provisions of the collective bargaining agreement then in effect between Petitioners and the Union (R. 10-12). The Temporary Restraining Order and Order to Show Cause were issued in the presence of the Union's counsel and over his vigorous opposition (R. 47-48). An Amended Complaint was filed on May 18, 1970, after telephone notice to the Union's counsel (R. 49). The Amended Complaint named Petitioner Standard Brands, Inc., as an additional party plaintiff and added a party defendant but reiterated the same allegations and prayer for relief (R. 1-10).[2] On the same day, the Superior Court issued a Modified Temporary Restraining Order extending the coverage of the original order to the parties named

---

[2]The Petitioners are hereinafter referred to as the "Employers".

in the Amended Complaint and a Show Cause Order with a return date of May 26, 1970 (R. 13-15).

The following day, May 19, 1970, the Union and individual Union officer and agent defendants filed a Petition for Removal of the case from state to federal court on the ground that the action arose under 29 U.S.C. §185 (R. 16-21). The Petition was amended on May 20, 1970, to include the Amended Complaint for injunction (R. 21-23). The case was thereupon removed to the United States District Court for the Northern District of California.

**B. Proceedings in the district court immediately following removal.**

Once the case had been removed to the district court, the Union and the other named defendants moved to dissolve the Temporary Restraining Order on the alleged ground that Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104) prohibited the federal court from maintaining the order in effect (R. 26-30). Immediately thereafter the Employers filed a Motion to Remand (R. 33-47).

The Motions to Dissolve and to Remand were heard on May 27, 1970. At the hearing the court denied the Motion to Remand and took the Motion to Dissolve under submission. On June 4, the court issued its order denying the Motion to Dissolve, relying on this Court's landmark decision in *The Boys Market, Inc. v. Retail Clerks' Union*, 398 U.S. 235 (1970) (R. 50-51). Thereafter the Union took no other action to dissolve the Modified Temporary Restraining Order or otherwise to seek further hearings to set aside that Order.

**C. The contempt proceeding in the district court.**

On December 1, 1970, the Employers filed a Motion for Contempt Judgment, alleging that since on or about November 30, 1970, the Union had, *inter alia,* engaged in picketing and directed work stoppages at the Employers' Bay Area facilities, in defiance of the Modified Temporary Restraining Order issued by the Superior Court of Alameda County and continued in effect after removal to the district court (R. 51-82).

The hearing on the Employers' Motion for Contempt Judgment was held on December 2, 1970. At the conclusion of the hearing the court adjudged the Union in willful contempt of an Order of the court which remained in full force and effect by reason of the provisions of the federal removal statute, 28 U.S.C. §1450 (R. 90-97).

**D. The decision of the Court of Appeals.**

A divided Court of Appeals reversed, two to one, the district court's judgment of contempt and vacated the contempt proceedings. In so doing, the Court majority held that the Modified Temporary Restraining Order issued by the state court could not, even after its removal to federal court, survive beyond June 7, 1970, the date which the Court considered to be the injunction's last effective date under California law.[3] The dissent objected to the majority's failure to

---

[3]The majority read California law as limiting the duration of a temporary restraining order to a mere 20 days. In fact, Section 527 of the California Code of Civil Procedure (Appendix, *infra*) expressly permits the continuance of a temporary restraining order for "a reasonable period" beyond 15 or 20 days as a matter of course to allow the defendant to meet the application for a preliminary

give effect to the plain language of 28 U.S.C. §1450. The dissent also pointed out the majority's failure even to consider the decisions of other Circuits unanimously holding that a state court temporary restraining order remains in effect in federal court regardless of state law, and regardless of any time limitations imposed by Rule 65(b) of the Federal Rules of Civil Procedure until it is dissolved by the federal court. *Appalachian Volunteers, Inc. v. Clark,* 432 F.2d 530 (6th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971); *General Elec. Co. v. Local Union 191,* 413 F.2d 964, 966 (5th Cir. 1969), *vacated and remanded on other grounds,* 398 U.S. 436 (1970); *Morning Telegraph v. Powers,* 450 F.2d 97 (2d Cir. 1971), *cert. denied,* 405 U.S. 954 (1972).[4]

---

**SUMMARY OF ARGUMENT**

Title 28, Section 1450, of the United States Code provides in plain, unambiguous language that after removal of a case from state to federal court, all state orders continue in effect until *the federal court* modifies or dissolves them. The Court of Appeals majority ignored this plain language and instead sought to limit the duration of such removed orders by refer-

---

injunction. Furthermore, a temporary restraining order under California law may be continued in effect beyond such period by stipulation of the parties, or "when the necessary business of the court prevents it from hearing the matter within that time." *McDonald v. Superior Court,* 18 Cal.App.2d 652, 657 (1937). Thus, state policy is *not* to impose an automatic termination date on temporary restraining orders in every case.

[4]None of these cases was distinguished or dealt with by the majority in any respect.

ence to the majority's interpretation of state law. The majority's decision does violence to the specific provision enacted by Congress. Furthermore, that decision totally ignores the unanimous decisions of other Courts of Appeals holding that a removed state court order does not expire automatically but remains in effect until the federal court acts to dissolve or modify it, even though the order would have expired automatically under state law had the case not been removed.

The Court of Appeals majority also concluded that Rule 65(b) of the Federal Rules of Civil Procedure limits the duration of removed state orders. But a general procedural rule such as Rule 65(b) cannot, under federal law or the rules of statutory construction, abrogate a conflicting Act of Congress narrowly and specifically addressed to the duration of *removed* orders.

The purpose imputed to Congress by the Court of Appeals majority to support the majority's reading of Section 1450 has absolutely no basis in the legislative history of the statute. Congress at no time indicated that the statute was intended merely to "prevent a break"[5] in the effectiveness of a state court order during the removal process. At no time did Congress indicate that after removal, the order expires on the expiration date set by state law. On the contrary, the history of Section 1450 demonstrates that Congress has never qualified Section 1450 or its predecessor statutes by reference to state law or to

[5]Opinion of the Court of Appeals, R. 116-117.

federal procedural rules regarding the duration of injunctive or other orders.

Finally, even assuming, *arguendo,* that the time limits set forth in Rule 65(b) of the Federal Rules of Civil Procedure applied to removed injunctive orders, those limits would apply only to *ex parte* orders. They would not apply to orders granted, as here, with both parties on notice and present in court. Nor would Rule 65(b) apply to an injunctive order after the district court has heard and denied a motion to dissolve that order. The denial of such a motion, according to the weight of federal judicial authority, converts the order into a preliminary injunction.

---

## ARGUMENT

### I

### THE PLAIN MEANING OF SECTION 1450 IS THAT INJUNCTIONS AND OTHER ORDERS REMAIN IN EFFECT AFTER REMOVAL OF THE CASE, REGARDLESS OF LIMITATIONS UNDER STATE LAW, UNTIL THE FEDERAL DISTRICT COURT DISSOLVES OR MODIFIES THE ORDER.

#### A. The language of the statute.

The language of Section 1450 relating to the duration of injunctive orders is plain and unqualified: *All state court orders are to remain in full force and effect in federal court after removal. Only if the federal court dissolves or modifies such a removed order does it cease to be effective.*

The majority opinion in the Court of Appeals disregards the plain and unqualified language of Section 1450 regarding the duration of injunctive orders. The majority decided that Section 1450 serves merely to

"prevent a break" in the effectiveness of an existing state order upon its removal to federal court, so that such order does not expire before the date when it would otherwise have expired in state court.[6] According to the analysis of the majority, a removed order continues to be subject to state law and policy. Therefore, the duration of a removed order in federal court is no greater than it is under state law.

The statute itself does not support such a construction of the law. The provision of Section 1450 in question here makes no reference to state law or policy. Rather, it provides that a removed order shall expire only in the event that the federal court dissolves it. Where, as here, the language of a statute is unambiguous, its plain meaning must be given effect. *Helvering v. New York Trust Co.,* 292 U.S. 455 (1934); *Thompson v. United States,* 246 U.S. 547 (1918); *Adams Exp. Co. v. Kentucky,* 238 U.S. 190 (1915).

The intent of Congress in enacting a particular statutory provision may frequently be deduced by comparing that provision with another part of the same statute. *White v. United States,* 305 U.S. 281 (1938); *Hellmich v. Hellman,* 276 U.S. 233 (1928). Congress drafted the provision of Section 1450 regarding attachments and sequestrations to defer to state law.

---

[6]The Ninth Circuit majority offers no authority for its novel interpretation of Section 1450. By referring to limitations allegedly imposed by state law, the Court of Appeals majority raises a false issue to divert attention from the plain language of Section 1450. In fact, as noted at n. 3, *supra,* California law does not establish an inflexible automatic expiration date for temporary restraining orders.

In contrast, *Congress prescribed in absolute terms, without reference to extrinsic law or policy, the duration of all injunctions and orders removed to federal court.* Had Congress intended to defer to state policy regarding the duration of orders, it would have been a simple matter to draft Section 1450 to accomplish that purpose. Its failure to do so justifies the conclusion that Congress did not intend state law to limit the duration of removed injunctions and orders. *Jerome v. United States,* 318 U.S. 101, 104 (1943).

**B. The case law.**

Several recent decisions in Circuits other than the Ninth Circuit consider the effect of Section 1450 on temporary restraining orders in cases removed to federal court. All of these decisions in other Circuits interpret Section 1450 differently from the Ninth Circuit. In each case the other Circuits have determined that Section 1450 precludes the automatic termination of a removed order. Thus, in *Appalachian Volunteers, Inc. v. Clark,* 432 F.2d 530 (6th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971), the Sixth Circuit rejected the contention that a temporary restraining order granted by a state court in a case subsequently removed to federal court expired no later than ten days after the removal petition was filed, pursuant to Rules 81(c) and 65(b) of the Federal Rules of Civil Procedure. Referring to Section 1450, the Court held as follows at *Appalachian Volunteers, Inc. v. Clark, supra,* at 533:

> "This clear statutory command must take precedence over the arguably contrary rule of proce-

> dure, and it would seem to *preclude the automatic termination* of the temporary restraining order obtained in the state court." [Emphasis added.]

In an earlier case the same Circuit ruled that by reason of Section 1450, affirmative action by the federal court in the form of a dissolution order is required to render a state court order ineffective after removal. *Munsey v. Testworth Laboratories,* 227 F.2d 902, 903 (6th Cir. 1955).

The Second Circuit reached the same conclusion concerning the effect of Section 1450 in *Morning Telegraph v. Powers,* 450 F.2d 97 (2d Cir. 1971), *cert. denied,* 405 U.S. 954 (1972). In that case, the Morning Telegraph had obtained an *ex parte* temporary restraining order[7] against the defendant union in state court. The Second Circuit said in dicta that the "restraint was to continue in effect until a hearing scheduled for March 3, 1971, but was extended automatically by 28 U.S.C. §1450 [footnote omitted] when removed by the Union to the federal district court * * *." *Morning Telegraph v. Powers, supra,* 450 F.2d at 98.

District courts in other Circuits have likewise consistently held that a removed order does not expire automatically, but continues in effect unless it is dissolved by the federal court. In *Peabody Coal Co. v. Barnes,* 308 F.Supp. 902, 903 (E.D Mo. 1969), the Court held that:

---

[7]In the instant case the state order was not granted *ex parte.* The Union's counsel was notified of the complaint and appeared in court to protest the restraining order vigorously (R. 47-49).

> "Under Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal *until and unless dissolved by this Court.*" [Emphasis added.]

In that case the Court ruled that Section 1450, not Rule 65(b), applied to the removed order. As a result, a temporary restraining order issued by a state court remained in effect *two and a half months* after its removal to the district court, until the district court dissolved it.

In *The Herald Co. v. Hopkins,* 325 F.Supp. 1232 (E.D.N.Y. 1971), the defendant union removed the underlying action to federal court after the plaintiff obtained a temporary restraining order against the defendant's strike and work slowdown. Defendant then moved to vacate the state court order. In ruling on the motion, the district court stated in dicta (*The Herald Co., supra,* 325 F.Supp. at 1233):

> "Of course, under 28 U.S.C. §1450, the State restraining order has remained in effect pending consideration of the motions and rendering of this decision."

In all of the above decisions applying and construing Section 1450, the courts concluded that a removed state order *does not* expire automatically on its termination date under state law, nor ten days after its removal under Rule 65(b). *Without exception, the courts of other Circuits have determined that only dissolution by the federal court terminates such a state court order.*

**C. Federal policy.**

The majority opinion's deference in the instant case to state law and policy regarding the duration of restraining orders not only contravenes the language of Section 1450 and existing authorities construing that statute but also ignores the established rule that state law has no application to questions of procedure once a case has been removed to federal court. Such questions are governed by federal law, *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Hanna v. Plumer*, 380 U.S. 460 (1965).

The federal courts, adhering to the foregoing decisions of this Court, have treated questions of time limitations on court orders and proceedings as procedural, and have looked to federal law to resolve them. Thus, in *Munsey v. Testworth Laboratories, supra*, the Sixth Circuit held that a default judgment rendered by a state court prior to removal was subject to being set aside by the federal court after removal, just as it would have been in state court before removal. But federal, not state, law determined the *time* in which the court was required to act to set aside the judgment. Similarly, federal law controls the time in which a motion to set aside a state court order after its removal to federal court must be made. *Butner v. Neustadter*, 324 F.2d 783, 785-786 (9th Cir. 1963).

By parity of reasoning, the duration of a restraining order is a procedural matter governed by federal law, even though the choice of that law affects the outcome of the case. In the instant case, the duration of the restraining order after its removal to federal court

was such a matter of procedure. Federal law thus determined the question of how long that order remained in effect. Contrary to the majority opinion in the instant case, state law could have no part in the determination of that question.

---

## II

### THE UNAMBIGUOUS PROVISION OF SECTION 1450 GOVERNING THE DURATION OF REMOVED ORDERS MUST PREVAIL OVER FEDERAL RULE 65(b).

As demonstrated above, Section 1450 precludes the automatic termination of state court orders following removal of the case to federal court. According to the statute, removed orders remain in full force and effect until the federal court dissolves or modifies them. The majority decision of the Ninth Circuit in the instant case, however, would subject removed restraining orders to the time limits prescribed by Rule 65(b) of the Federal Rules of Civil Procedure for temporary restraining orders issued *ex parte*. Rule 65(b) provides that a temporary restraining order shall expire within ten days of the date the order is entered, a limitation patently inconsistent with the language of Section 1450.

The conclusion that Rule 65(b) limits the duration of removed orders contravenes federal law. It is true that Rule 81(c) of the Federal Rules provides in general terms that "These rules [Federal Rules of Civil Procedure] apply to civil actions removed to the United States district courts from the state courts

and govern procedure after removal." However, in 28 U.S.C. §2071 (1970), Congress expressly provided that federal rules of court shall be consistent with Acts of Congress:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. *Such rules shall be consistent with Acts of Congress* and rules of practice and procedure prescribed by the Supreme Court." [Emphasis added.]

See, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1940); *Beers v. Haughton*, 9 Pet. 329 (1835).

Rule 81(c), to the extent that it arguably makes removed injunctive orders subject to the time limitation prescribed by Rule 65(b), is *not* consistent with Section 1450, a specific Act of Congress on that subject. Therefore, the Federal Rules are ineffective to narrow the unqualified provision of Section 1450 respecting the duration of removed orders.

Furthermore, Section 1450 is addressed specifically to the question of the duration of orders in removed cases, while Rule 65(b) is not so limited. To subject restraining orders in removed cases to the provisions of Rule 65(b) would be to diminish the unqualified language of Section 1450, contrary to the rules of statutory construction. In *Bondurant v. Watson*, 103 U.S. 281 (1881), a case involving the interpretation of a predecessor statute to Section 1450, this Court ruled that:

> "It would not be according to the well settled rules of statutory construction to import an exception into this statute [predecessor to Section 1450] from a prior one on a different subject [the federal statute which forbade a federal court from staying state court proceedings]."

Section 1450, not Rule 65(b), therefore applies to removed state court restraining orders and continues such orders in effect until dissolved by the federal court. *Peabody Coal Company v. Barnes,* 308 F.Supp. 902 (E.D. Mo. 1969).

The courts have long recognized that different rules may apply to removed and nonremoved cases heard in federal court. Thus, in *Eureka & K. R.R. Co. v. California & N. Ry. Co.,* 103 F. 987 (C.C. Cal. 1900), *aff'd,* 109 F. 509, the circuit court held that a federal law prohibiting a federal court from enjoining a state court proceeding applied to actions commenced in federal court but not to actions removed there. The latter were governed by the Act of March 3, 1875, c. 137, §4, 18 Stat. 470, predecessor statute to Section 1450.

Even assuming, *arguendo,* that Rule 65(b) is applicable to removed orders, that Rule by its terms applies only to temporary restraining orders granted *without notice.* However, the Union did have prior notice when the Employers filed their original and amended complaints, and the Union was represented in court when Judge Lercara issued his order of May 15. Where notice of the application for a tempo-

rary restraining order is given to the opposing party, the order becomes in effect a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir. 1965); *Pan American World Air. v. Flight Eng. Intern. Assoc.*, 306 F.2d 840 (2d Cir. 1962); *Sims v. Greene*, 160 F.2d 512 (3d Cir. 1947). The order ceases to be subject to the ten-day limitation of Rule 65(b):

> "If the opposing party has notice of the application for a temporary restraining order, such order does not differ functionally from a preliminary injunction and is subject to no special procedural requirements."

3 Barron & Holtzoff, Federal Practice and Procedure §1432 (1961). See also, *Dilworth v. Riner, supra,* at 229.

Moreover, Rule 65(b) does not apply where the party enjoined has had a hearing on the facts pertinent to a decision on the motion. *Miami Beach Fed. Sav. & Loan Assoc. v. Callander*, 256 F.2d 410 (5th Cir. 1958). The Union had an opportunity to argue the facts when it appeared in the district court on May 27, 1970, and moved to dissolve the Modified Temporary Restraining Order. At that time the district court took the Union's motion under careful consideration and ultimately denied it. Whether or not the Union exhausted the possible legal grounds for its motion is not controlling. It is important that the Union had the opportunity to raise them. See, *Carpenters' District Council, etc. v. Cicci*, 261 F.2d 5, 8 (6th Cir. 1958).

For the foregoing reasons, the ten-day limitation of Rule 65(b) is inapplicable to the removed temporary restraining order in the instant case, and that order remained in effect.

---

## III

### THE HISTORICAL EVOLUTION OF THE LANGUAGE OF SECTION 1450 DEMONSTRATES THAT THE EFFECTIVE DURATION OF INJUNCTIONS AND ORDERS AFTER REMOVAL OF THE CASE IS NOT LIMITED BY STATE LAW OR FEDERAL PROCEDURAL RULES.

There is no recorded Congressional debate or comment on Section 1450 or its antecedents to show how Congress intended the language relating to the duration of injunctions to be interpreted. However, the historical development of that provision does demonstrate that Congress never limited the duration of removed injunctions and orders to time limits set forth in state law or federal procedural rules governing actions originating in federal court. Rather, essentially the same language governing removed injunctions and orders was enacted and re-enacted by Congress over a period of more than one hundred years.

Section 1450 carries over the exact language of 28 U.S.C. §79 (1940 ed.) That language was derived from the Act of March 3, 1911, c. 231, §36, 36 Stat. 1098,[8]

---

[8]The Act of March 3, 1911, provided that:

"When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same

and the Act of March 3, 1875, c. 137, §4, 18 Stat. 470.[9] The first statutory provision for the disposition of an

manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." 36 Stat. 1098.

See Conference Report of the Special Joint Committee on Revision and Codification of the Laws of the United States on S. 7031 relative to revision and codification of laws relating to the judiciary, March 1, 1911, S. Rep. No. 388, 61st Cong., 2d Sess. Part 1 of the Report contains an explanatory statement of each section of the bill. Regarding Section 36, the Report merely notes the derivation of the section from the Act of March 3, 1875, *supra*, and Title XII, c. 7, §646 of the Revised Statutes, with two changes in language: the deletion of the word "and" at the beginning of the last sentence, and the substitution of "district court" for "circuit court".

[9]The Act of March 3, 1875, c. 137, §4, *supra*, provided as follows:

"Section 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; *and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.*" 18 Stat. 470. [Emphasis added.]

Section 4, Chapter 137, of the Act of March 3, 1875, superseded Title XII, c. 7, §646, of the Revised Statutes, which provided that

"Sec. 646. When a suit is removed for trial from a State court to a circuit court, as provided in the foregoing sections, any attachment of the goods or estate of the defendant by the original process shall hold the same to answer the final judgment, in the same manner as by the laws of such State they would have been held to answer final judgment had it been rendered by the court in which the suit was commenced; *and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into*

injunction granted by the state court after removal of the underlying cause to federal court was made in the Act of July 27, 1866, entitled, "An Act for the Removal of Causes in certain cases from State Courts," c. 288, 14 Stat. 306. That Act provided, *inter alia*, that where removal of an action from state to federal court was effected according to its provisions,

> ". . . [A]ny attachment of the goods or estate of the defendant by the original process shall hold the goods or estate so attached to answer the final judgment, in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered by the court in which the suit commenced; *and any injunction granted before the removal of the cause against the defendant applying for its removal shall continue in force until modified or dissolved by the United States court into which the cause shall be removed;* and any bond of indemnity or other obligation given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process against the defendant petitioning for the removal of the cause, shall also continue in full force and may be prosecuted by the defendant and made available for

---

*which the cause is removed;* and any bond of indemnity or other obligation, given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process, against the defendant petitioning for the removal of the cause, shall also continue in full force and may be prosecuted by the defendant and made available for his indemnity in case the attachment, injunction, or other restraining process be set aside or dissolved, or judgment be rendered in his favor, in the same manner, and with the same effect as if such attachment, injunction, or other restraining process had been granted, and such bond had been originally filed or given in such State court." [Emphasis added.]

his indemnity in case the injunction, attachment, or other restraining process be set aside or dissolved, or judgment rendered in his favor in the same manner and with the same force and effect as if such injunction, attachment, or restraining process had been granted, and such bond had been originally filed or given in the court to which the cause is removed." 14 Stat. 306. [Emphasis added.][10]

In none of these antecedent statutes did Congress tie the duration of an injunction after removal of the case to state law or state procedural rules. This treatment contrasts with the treatment of attachment of a defendant's goods or estate and with the treatment of indemnity bonds. In all of these removal statutes, as in the present law, Section 1450, post-removal treatment of an *attachment* effected in the state court was expressly made dependent on the provisions of state law. By the Act of July 27, 1866, *supra*, 14 Stat. 306, and by various earlier statutes,[11] Congress al-

---

[10]These provisions of the Act of July 27, 1866, were incorporated in the Act of July 27, 1868, c. 253, §2, 15 Stat. 227, and in the amendatory Act of March 2, 1867, c. 146, 14 Stat. 558.

[11]Act of March 3, 1911, c. 231, §36, 36 Stat. 1098;
Act of March 3, 1875, c. 137, §4, 18 Stat. 470;
Act of July 27, 1866, 14 Stat. 306.
For earlier removal statutes, consistently deferring to state law regarding attachment, see:
Act of September 24, 1789, c. 20, §12, 1 Stat. 73;
Act of March 2, 1833, c. 57, §3, 4 Stat. 632;
Act of March 3, 1863, c. 91, §5, 12 Stat. 755;
Act of April 9, 1866, c. 31, §3, 14 Stat. 27;
Act of May 11, 1866, c. 80, §3, 14 Stat. 46;
Act of July 13, 1866, c. 184, §67, 14 Stat. 98;
Act of February 5, 1867, c. 27, 14 Stat. 385; and
Act of February 28, 1871, c. 99, §16, 16 Stat. 433.

lowed the defendant to recover on an indemnity bond to the degree that he would have been able to do so had the action commenced in federal court. Congress applied *neither* limitation to the clause of the removal statute regarding the post-removal disposition of an injunction issued by the state court. With some minor changes in phraseology, Congress has consistently provided that such injunctions "shall continue in force until modified or dissolved by the United States court into which the cause shall be removed . . ."[12] Had Congress intended to limit the duration of such an injunction to state law or federal procedural rules, it had at its disposal the language to do so. But Congress made no such limitation.

Thus, the intent imputed to Congress by the Court of Appeals majority to support their reading of Section 1450 has absolutely no basis in the legislative history of the statute. There is nothing in that history to suggest that Congress, by enacting Section 1450, intended only to "prevent a break" during removal in the effective period of a restraining order as prescribed by state law.

Moreover, where the legislative history fails to explain the intent of Congress, it is improper to adopt an interpretation not suggested by the plain language of the statute. *Segal v. Rochelle,* 382 U.S. 375, 383 (1966) ("* * * [A]n uncertain guess at Congress' intent provides dubious ground for disregarding its plain language."). Furthermore, even if illuminating

[12]14 Stat. 306.

legislative comment or debate were available, the language of the statute itself would remain the foremost guide to legislative intention. See, *United States v. American Trucking Associations,* 310 U.S. 534, 543 (1940), *reh. denied,* 311 U.S. 724, where this Court articulated the following principle:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning."

---

## IV

### THE DISTRICT COURT'S DENIAL OF THE UNION'S MOTION TO DISSOLVE THE REMOVED TEMPORARY RESTRAINING ORDER CONSTITUTED THE GRANTING OF A PRELIMINARY INJUNCTION.

Even apart from the operation of Section 1450, the Employers' removed restraining order did not expire within the time limits prescribed in Rule 65(b) but continued in full force and effect. The district court's denial of the Union's motion to dissolve the order effectively converted the restraining order into a preliminary injunction. See, *Morning Telegraph v. Powers,* 450 F.2d 97 (2d Cir. 1971), *cert. denied,* 405 U.S. 954 (1972); *Appalachian Volunteers, Inc. v. Clark,* 432 F.2d 530 (6th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971); *General Elec. Co. v. Local Union 191,* 413 F.2d 964 (5th Cir. 1969), *vacated and remanded on*

*other grounds,* 398 U.S. 436 (1970); *Peabody Coal Co. v. Barnes,* 308 F.Supp. 902 (E.D. Mo. 1969).

The distinction between a temporary restraining order and a preliminary injunction lies in the necessity of notice to the adverse party before a preliminary injunction may issue. See, Rule 65(a)(1), Fed. R.Civ.P. The party opposing a preliminary injunction must have an opportunity to present evidence and argument in his own behalf at a hearing. 7 Moore, *Federal Practice* ¶65.04[3] (1972). *Marshall Derbin Farms, Inc. v. National Farmers Org., Inc.,* 446 F.2d 359 (5th Cir. 1971); *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Co.,* 443 F.2d 867 (2d Cir. 1971); *Consolidated Coal Co. v. Disabled Miners of So. W. Va.,* 442 F.2d 1261 (4th Cir. 1971), *cert. denied,* 404 U.S. 911 (1971); *Cerutti, Inc. v. McCrory Corp.,* 438 F.2d 281 (2d Cir. 1971); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541 (9th Cir. 1969).

These safeguards of notice and a hearing at which both sides have the opportunity to present evidence and argument operate whether the hearing is convened on the plaintiff's application for a preliminary injunction or on the defendant's motion to dissolve a yet unexpired temporary restraining order.

In *Morning Telegraph v. Powers, supra,* the union filed three motions to vacate a removed temporary restraining order which was still in effect by force of Section 1450. The motions were denied. The Second Circuit, ruling that the lower court's orders were

appealable, held as follows at *Morning Telegraph v. Powers, supra,* 458 F.2d at 99:

> "* * * [T]he practical effect of the refusal [of the district court] to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief. [Citation omitted.]"

The court reasoned that the union had been heard on the merits of preliminary relief each time that it presented its motion to dissolve the restraining order.

The Fifth Circuit, in *General Elec. Co. v. Local Union 191, supra,* held that the court below properly granted the defendant's motion to dissolve a state court temporary restraining order after removal of the case. Citing Section 1450, the Court declared that (*General Elec. Co. v. Local Union 191, supra,* 413 F.2d at 966):

> "We are of the view that the District Court did not err in dissolving the injunction * * * because, in our view, once this case was removed, *a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal court* * * *." [Emphasis added.]

See also, *Appalachian Volunteers, Inc. v. Clark, supra; Peabody Coal Co. v. Barnes, supra.*

The Court of Appeals majority held in this case that the district court's denial of the Union's motion to dissolve the state court restraining order did not constitute the granting of a preliminary injunction. The majority's decision ignored both the contrary authority of other Circuits and the practical and legal

bases for distinguishing between temporary restraining orders and preliminary injunctions.

Here, the Union had an opportunity to be heard on the merits of the restraining order when it moved in federal district court to dissolve the removed injunctive order. The district court took the motion under submission and duly denied it. As the Court of Appeals dissent observed, there was then no effective distinction in the posture of the case from the situation where a preliminary injunction is granted pending trial on the merits.

---

## CONCLUSION

On the basis of the foregoing analysis, it is respectfully submitted that the judgment of the court below should be reversed.

Dated, San Francisco, California,
November 21, 1973.

WESLEY J. FASTIFF,
GEORGE J. TICHY, II,
NANCY L. OBER,
LITTLER, MENDELSON & FASTIFF,
*Attorneys for Petitioners.*

**(Appendix Follows)**

## Appendix

Title 28, Section 2071, of the United States Code (1970), provides as follows:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Rule 65(b) of the Federal Rules of Civil Procedure provides as follows:

> **(b) Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the

order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Rule 81(c) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> **(c) Removed Actions.** These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. * * *

Section 527 of the California Code of Civil Procedure (West 1971) provides in pertinent part as follows:

> * * *
>
> No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted with-

out notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than *15* **[1]** *days or, if good cause appears to the court, 20 days* **[2]** from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. * * *